INTERIOR BOARD OF INDIAN APPEALS

Tiger Outdoor Advertising, Inc. v. Eastern Area Director, Bureau of Indian Affairs

22 IBIA 280 (09/09/1992)

United States Department of the Interior

OFFICE OF HEARINGS AND APPEALS
INTERIOR BOARD OF INDIAN APPEALS
4015 WILSON BOULEVARD
ARLINGTON, VA 22203

TIGER OUTDOOR ADVERTISING, INC.
v.
EASTERN AREA DIRECTOR, BUREAU OF INDIAN AFFAIRS

IBIA 92-138-A Decided September 9, 1992

Appeal from a decision cancelling a lease of tribal land.

Affirmed as modified.

1. Board of Indian Appeals: Generally

Under Board of Indian Appeals procedures, an appellant is not required to file an opening brief and may choose to rely on materials already in the record. However, an appellant who waives his opportunity to file an opening brief is not entitled to present his case in chief in a reply brief filed after the answer briefs of opposing parties have been filed.

2. Indians: Leases and Permits: Cancellation or Revocation

When a lessee of Indian land has been given ample opportunity to cure a breach of his lease and has failed to do so, despite notice given pursuant to the cancellation procedures in the lease, the Bureau of Indian Affairs may cancel the lease.

APPEARANCES: Richard W. Gross, Esq., Hialeah, Florida, for appellant; John H. Harrington, Esq., Office of the Regional Solicitor, Southeast Region, U.S. Department of the Interior, Atlanta, Georgia, for the Area Director.

OPINION BY ADMINISTRATIVE JUDGE VOGT

Appellant Tiger Outdoor Advertising, Inc., seeks review of a February 6, 1992, decision of the Eastern Area Director, Bureau of Indian Affairs (Area Director; BIA), cancelling a lease of Miccosukee tribal land. For the reasons discussed below, the Board affirms the Area Director's decision as modified in this opinion.

Background

Appellant is a Florida corporation. 1/ On April 21, 1988, it entered into a lease with the Miccosukee Tribe of Indians of Florida (Tribe), by which it leased two sites within the Tribe's Alligator Alley Reservation for the purpose of constructing and maintaining outdoor advertising signs, i.e., billboards. The lease term was 10 years, beginning December 1, 1988. The lease required that rent be paid monthly. 2/ It also required, inter alia, that appellant post a performance bond. The Area Director approved the lease on December 13, 1988.

Almost immediately, appellant fell into a pattern of non-compliance. The record includes extensive correspondence between the Tribe, the Area Director, and appellant, documenting repeated attempts to bring appellant into compliance. 3/ Appellant paid rent belatedly, usually several months worth at a time, only after demands and/or threats of lease cancellation from the Tribe or the Area Director.

On August 17, 1989, the Tribe wrote to appellant, stating that appellant was 3 months behind in rent and had failed to submit construction plans, a certificate of insurance, or a performance bond, all of which were required by the lease. In October 1989, appellant paid 5 months' overdue rent. It also submitted construction plans and a certificate of insurance. It stated, however, that it was having trouble obtaining a performance bond and requested permission from the Tribe to pre-pay 1 year's rent rather than obtain a bond.

By March 1990, appellant was again behind in its rent. On March 5, 1990, it paid 5 months' overdue rent. It also made a $12,000 payment,

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1/ Appellant's articles of incorporation show that its incorporator was Calvin Lee Tiger and its initial directors were Calvin Lee Tiger and Cathy Angela Tiger. A certificate from the Florida Department of State shows that appellant was incorporated on Oct. 10, 1988.

Appellant submitted copies of these documents with its reply brief in this appeal. Apparently, however, appellant did not submit them to the Tribe or BIA during the time period covered by this appeal.

2/ Paragraph 2 of the lease provides:

"The Lessee shall pay to the Lessor in equal monthly installments in advance on the first day of each month during the Lease Term a rent, to be calculated for each Billboard erected, of $500.00 each month * * * or 15 percentum of the gross income Lessee derives from each Billboard, whichever is greater. Whenever Interstate 75 is completed from the Collier County-Broward County Line to Andytown, the Basic Rent shall be $1,000.00 each month for each Billboard * * * or 30 percentum of the gross income Lessee derives from each Billboard, whichever is greater."

3/ In addition to its role as lessor, the Tribe performs what would ordinarily be BIA realty functions, pursuant to a contract under the Indian Self-Determination Act, 25 U.S.C. § 450-450n (1988).

representing one year's advance rent. The Tribe apparently accepted this payment in lieu of a performance bond. 4/

Appellant again fell behind in rent, however, after its rent increased in July 1990, as a result of the completion of the portion of Interstate 75 referred to in paragraph 2 of the lease. See note 2 supra. Another round of demands for payment by the Tribe and eventual payments by appellant ensued.

On September 24, 1991, the Area Director ordered appellant to show cause why its lease should not be cancelled for failure to pay overdue rent in the amount of $14,675 and for failure to obtain a performance bond. 5/

Appellant paid the overdue rent on October 1, 1991, but did not submit a performance bond. The Tribe wrote to appellant on the same day, acknowledging receipt of the rental payment but stating:

> Universal Outdoor and Mr. Charles Hancock have always paid the rent. The copies of the contracts with the advertisers are also with Universal Outdoor. We have no documentation of any connection between [appellant] and Universal Outdoor. This must be clarified. Be aware that any assignment of this lease requires the Tribe's and the Secretary of the Interior's approval.
>
> What is the status of Tiger Outdoor Advertising? Is it a corporation, partnership, or company? We must have documentation of the status. Corporation status requirements include the articles of incorporation, officers of the

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4/ Although there is no explicit agreement to this effect in the record, the receipt issued by the Tribe stated that the payment was in lieu of a performance bond.

Of course, absent a written lease modification, approved by BIA, appellant remained bound by the performance bond requirement in the lease, despite any informal agreement with the Tribe. See, e.g., McGriff Exploration, Inc. v. Acting Anadarko Area Director, 22 IBIA 265, 268-69 (1992).

5/ The Area Director's order was issued under 25 CFR 162.14, which provides:

"Upon a showing satisfactory to the Secretary that there has been a violation of the lease or the regulations in this part, the lessee shall be served with written notice setting forth in detail the nature of the alleged violation and allowing him ten days from the date of receipt of notice in which to show cause why the lease should not be cancelled. * * * If within the ten-day period, it is determined that the breach may be corrected and the lessee agrees to take the necessary corrective measures, he will be given an opportunity to carry out such measures and shall be given a reasonable time within which to take corrective action to cure the breach. If the lessee fails within such reasonable time to correct the breach or to furnish satisfactory reasons why the lease should not be cancelled, the lessee shall forthwith be notified in writing of the cancellation of the lease."

> corporation, and a list of the stockholders. Partnership documentation requirements are type of partnership, list of partners, and partner responsibilities.
>
> * * * * * *
>
> Due to your past performance, as stated in the lease on page 5, Section 8 Security, we require a Performance Bond in the amount of $12,000. You have 30 days from receipt of this letter to obtain a Performance Bond with the conditions stated in the lease.

On October 28, 1991, Charles Hancock wrote to the Area Director, apparently in response to the Tribe's October 1 letter. He stated:

> [Appellant] is not incorporated. [6/] It is a company and a division of Lee Tiger & Associates. It is solely owned by Lee Tiger. Universal Outdoor, Inc., is owned solely by Charles Hancock and has a management agreement with [appellant] to manage the billboards on the Miccosukee Indian Reservation. I've enclosed a copy of the agreement between Lee Tiger of [appellant] and Charles Hancock of Universal Outdoor, Inc. [7/] [Appellant] has moved; all correspondence should be sent to: 10195 S. Indian River Drive, Ft. Pierce, Fl 34982.
>
> In response to your question of the Performance Bond, I have enclosed two letters [to tribal representatives, dated November 3 and 6, 1989]. I have requested to pay $12,000.00 to the Tribe

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6/ This statement is incorrect. See note 1, supra.

7/ The management agreement provides in its entirety:

"This AGREEMENT is made between Tiger Outdoor Adv. (Lee Tiger) and Universal Outdoor, Inc. (Charles Hancock) on this 16th day of May 1989.

"In consideration of the sum of $8,000.00 to be paid to Tiger as follows: $4,000.00 to be paid upon the completion of two billboard structures located on I-75 on the Indian Reservation, and the remaining $4,000.00 to be paid twelve months later.

"It is mutually agreed that a rate of 10% shall be paid to Tiger for any sales contract brought in for these signs, signed by Lee Tiger.

"[Appellant] agrees to no non-compete and will continue to build and lease more sign space.

"Hancock is responsible for all lease payments made to the Tribe from now until the end of the lease.

"Hancock is responsible for all light bills, paint costs, permit fees, etc. or any other costs having to do with the construction and maintenance of these signs.

"[Appellant] is to receive .05% of net profit off advertising income whether sold or not sold by [Appellant] and .05% net profit off sale of structure."

(one year advance rent) in lieu of the Performance Bond. This was accepted and that amount was paid to the Tribe on 3/5/90.

Hancock's letter indicated that copies had been sent to the Chairman of the Tribe and to the Tribal Land Resources Manager.

On November 15, 1991, the Area Director responded to Hancock, stating:

> We have been advised by the [Tribe] that [appellant] is delinquent in rental payments and has not posted a surety bond. This office is awaiting further investigation from the tribe regarding the lease cancellation.
>
> The [management] agreement between [appellant] and Universal Outdoor Advertising has not been approved by the tribe, the Secretary of the Interior or his delegated representative pursuant to the ground lease, section 6: Transfer by Lessee.
>
> It is our suggestion that Mr. Tiger comply with the terms of the lease and contact [the] Tribal Land Resources Manager.

On January 7, 1992, the Tribe wrote to appellant, stating that neither a performance bond nor a clarification of appellant's relationship with Universal Outdoor had been received. The Tribe continued: "[W]e have no recourse but to exercise the Event of Default; Termination 8(b) portion of your lease. * * * You have failed to provide the requested items in more than double the time allotted in our October 1, 1991 letter. You have until January 24, 1992 to cure the defaults."

Appellant did not respond. On February 6, 1992, the Area Director cancelled appellant's lease, stating:

> Due to your past performance, on October 1, 1991, you were requested to post a Performance Bond in the amount of $12,000.00. You were allowed thirty (30) days from receipt of the notice for compliance. You have failed to meet the terms of the lease by not posting a Security Bond, and in violation of 25 CFR, Part 162.5(c).
>
> On January 7, 1992, you were notified again, by certified mail, of your failure to respond to [a] written request to provide:
>
> 1. Performance Bond (Section 10 - Security)
>
> 2. Information regarding your business arrangement with Charlie Hancock, President of Universal Outdoors, Incorporated. (See Section 6 - Transfer by Lesssee.)
>
> At the request of the [Tribe], the April 21, 1988, ground lease is herewith canceled, due to the failure to post security

bond and provide information pursuant to Section [6] - Transfer by Lessee.

Appellant's notice of appeal from this decision was received by the Board on March 19, 1992. Appellant did not file an opening brief but filed a reply brief after the Area Director filed his brief.

Discussion and Conclusions

The Area Director's brief is succinct. He argues that the cancellation was proper because the Tribe and the Area Director properly followed the cancellation procedure established in the lease and because appellant had almost 4 months from the Tribe's October 1, 1991, default notice to cure its default but did not do so.

[1] Appellant made no arguments until it filed a reply brief. Under the Board's procedures, an appellant is not required to file an opening brief but may choose to rely on materials already in the record. Further, an appellant who waives his opportunity to file an opening brief may still file a reply brief responding to arguments made in briefs filed by opposing parties. By allowing appellants this latitude, however, the Board does not intend to authorize an appellant to reserve his argument in chief until he files a reply brief. To do so would deprive opposing parties of the opportunity to respond to the appellant's arguments, an opportunity to which they are entitled under the regulations. Cf., e.g., Joint Board of Control for the Flathead, Mission and Jocko Irrigation Districts v. Acting Portland Area Director, 22 IBIA 22, 28 (1992).

Most of the arguments made in appellant's reply brief are directed to the decision on appeal, not to the Area Director's brief. These arguments should have been made in an opening brief rather than a reply brief. Under other circumstances, the Board would have either declined to consider these arguments or given opposing parties an opportunity to respond to them. In this case, however, the Board finds that appellant cannot prevail even if its arguments are considered. Accordingly, the Board sees no point in delaying resolution of this appeal.

Two provisions of appellant's lease are critical to this appeal--Paragraph 10, Security, and Paragraph 8, Events of Default; Termination. Paragraph 10 provides:

> The Lessee shall obtain a bond securing the full and faithful performance by Lessee of the terms, covenants and conditions of this Lease ("Performance Bond"). Such Performance Bond shall be in an amount equal to or exceeding one year's rental for each sign covered by this Lease. Upon the execution of this Lease and thereafter not less than fifteen (15) days prior to expiration of any such Performance Bond delivered under this section 10, Lessee shall deliver to Lessor evidence, satisfactory to the Lessor, as to the issuance and effectiveness of such Performance Bond, the

amount of coverage afforded thereby and the payment of premiums therefor. [8/]

Paragraph 8 provides:

> If any one or more of the following events ("Events of Default") shall occur:
>
> (a) If Lessee shall fail to pay the Basic Rent or other sum payable hereunder by Lessee to Lessor when and as the same becomes due and payable; or
>
> (b) If Lessee shall fail to perform or comply with any other term hereof and such failure shall continue for more than thirty (30) days after written notice thereof from Lessor, and Lessee shall not within such period commence with due diligence and dispatch the curing of such default, or if Lessee shall, within such period, commence with due diligence and dispatch to cure such default and shall thereafter fail or neglect to prosecute and complete with due diligence and dispatch the curing of such default;
>
> * * * * * *
>
> Lessor and the Secretary at any time thereafter may provide a written termination notice to Lessee specifying a date not less than five (5) days of giving such notice on which this Lease shall terminate and on such date this Lease shall terminate and all rights of Lessee under this lease shall cease, unless before such date (i) all arrears of Basic Rent and all other sums payable by Lessee under this lease * * * shall have been paid by Lessee and (ii) all other defaults at the time existing under this Lease shall have been fully remedied to the satisfaction of Lessor and the Secretary.

Paragraph 1 of the lease acknowledges that the lease is subject to 25 CFR Part 162. There is a substantial difference between the cancellation procedure in paragraph 8 and the cancellation procedure in 25 CFR

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8/ A performance bond is also required by the regulations governing leases of Indian lands. 25 CFR 162.5(c) provides:

"Unless otherwise provided by the Secretary a satisfactory surety bond will be required in an amount that will reasonably assure performance of the contractual obligations under the lease. Such bond my be for the purpose of guaranteeing:

"(1) Not less than one year's rental unless the lease contract provides that the annual rental shall be paid in advance.

"(2) The estimated construction cost of any improvement to be placed on the land by the lessee.

"(3) An amount estimated to be adequate to insure compliance with any additional contractual obligations."

162.14 (see note. 5, supra). The notice provision in paragraph 8 is clearly more favorable to appellant. The Area Director argues that the two provisions are not in conflict and that compliance with the notice provision in paragraph 8 necessarily satisfies the regulations as well. The Board agrees that, if appellant received the benefit of the more liberal provisions in paragraph 8, the apparent differences in the two provisions are of no consequence here.

Appellant argues that the cancellation procedure contemplated in paragraph 8 of the lease was never adequately implemented. Appellant also complains that some of the letters it received invoked the regulatory cancellation procedure, and others the paragraph 8 cancellation procedure.

While it is true that the Area Director's September 24, 1991, letter was issued under the regulatory cancellation procedure, the Tribe's October 1, 1991, letter initiated the cancellation procedure established in paragraph 8 of the lease. It was this latter procedure upon which the Area Director relied in his February 6, 1992, decision.

The Area Director's cancellation of appellant's lease was based on two grounds--failure to obtain a performance bond and failure to submit information concerning appellant's relationship with Charles Hancock and Universal Outdoor, Inc. With respect to the performance bond requirement, it clearly appears that the paragraph 8 procedure was followed. The Tribe's October 1, 1991, letter constituted the first step contemplated in the procedure. Appellant was explicitly given 30 days to obtain a performance bond. The Tribe's January 7, 1992, letter constituted the second step. Appellant was given a date certain by which it was to cure its default.

Appellant contends that the language of these letters was not specific enough to invoke the cancellation procedure in the lease. The Board cannot agree. The language was clear enough to put appellant on notice that it must obtain a performance bond or face cancellation. Further, the Area Director's September 24, 1991, letter had already informed appellant that its lease was under threat of cancellation for lack of a performance bond.

Appellant also contends that it was not required by paragraph 8 to obtain a bond but only to show due diligence in trying to obtain one. There is, however, no evidence in the record of any diligence on the part of appellant. As far as the record shows, appellant did not respond to the Tribe at all following the Tribe's October 1, 1991, letter. Rather, Charles Hancock wrote to the Area Director describing appellant's earlier apparent agreement with the Tribe to pay advance rent (during 1990) rather than obtain a performance bond. See Hancock's October 28, 1991, letter, quoted supra. Appellant now contends that Hancock intended to suggest that the same arrangement be repeated (Appellant's Reply Brief at 4). There is no evidence that appellant or Hancock made that suggestion to the Tribe, however, even after the Area Director informed Hancock that the matter was being handled by the Tribe. In any case, that suggestion alone does not constitute due diligence in obtaining a bond.

Appellant further argues that the notices of default sent by the Area Director and the Tribe were sent to the wrong address, resulting in delayed receipt by appellant. The letters were sent to the address given in the lease for notices to appellant. 9/ Appellant does not contend that it ever mailed a change of address for notice purposes, either to the Tribe or BIA. Hancock's October 28, 1991, letter stated that appellant hd moved to an address in Fort Pierce, Florida. That address, however, was actually the address of Hancock and Universal Outdoor, Inc. In its brief before the Board, appellant states that Lee Tiger, appellant's principal, had moved in 1989 to an address in Miami different from the address given in the lease.

The purpose of including notice addresses in a lease is, of course, to avoid a situation where a party must be tracked down in order to give him notice under the lease--to avoid, in other words, the very kind of task appellant seeks to impose upon the Tribe and the Area Director here. The Board finds that neither the Tribe nor the Area Director erred in sending notice to appellant at the address given in the lease.

In any event, it is apparent that appellant did receive the notices, and appellant does not contend to the contrary. It is clear, for instance, that both appellant and Hancock had received the Tribe's October 1, 1991, letter by October 28, the date Hancock wrote to the Area Director. Yet, over 2 months later, it bad taken no action to correct its default. Clearly, appellant's “late” receipt of notice cannot explain that delay.

In its notice of appeal to the Board, appellant stated that it was attempting to obtain a bond. With its reply brief, it submitted a bond dated May 26, 1992. Appellant argues that its default is now cured. However, the fact that appellant has now obtained a bond--nearly 4 months after its lease was cancelled--does not render the cancellation invalid.

[2] Neither BIA nor the Tribe was required to give appellant endless opportunities to cure its breach. In Mast v. Aberdeen Area Director, 19 IBIA 96, 99 (1990), concerning a cancellation under 25 CFR 162.14, the Board held that "[i]n considering whether a breach may be cured, it is entirely appropriate for BIA to take into account the lessee's past performance under the lease, particularly where the breach at issue is one of long duration or frequent recurrence." Appellant's failure to obtain a performance bond dated from inception of the lease, despite frequent reminders that a bond was required. Further, appellant's rental payment

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9/ Paragraph 14 of the lease provides:

“All notices and other communications hereunder shall be in writing and shall be deemed to have been given when delivered or mailed first-class, registered or certified mail, postage prepaid, addressed (a) if to Lessee:

Tiger Outdoor Advertising
19964 S.W. 122nd Ct.
Miami, FL 33177
(305) 252-0791

or such other address as Lessee shall have furnished to Lessor.”

record was poor, making a performance bond more critical than it ordinarily would be.

It is apparent from the Tribe's October 1, 1991, letter that, even though the Tribe had once informally allowed appellant to pay advance rent instead of posting a performance bond, it now believed that the bond requirement of the lease must be enforced because of appellant's repeated failures to pay rent in a timely fashion. In French v. Aberdeen Area Director, 22 IBIA 211, 216 (1992), the Board stated that "the fact that [a lessee's] prior breaches were forgiven does not create an enforceable right for him to breach the leases in the future with impunity, nor does it deprive the landowners of the rights they have under the leases." As the Board held in French, the Tribe clearly had the right to demand that appellant post a performance bond.

The Board affirms the Area Director's cancellation of appellant's lease insofar as it was based on appellant's failure to obtain a performance bond.

With respect to the Area Director's second reason for cancelling the lease, i.e., appellant's failure to provide information concerning its relation with Universal Outdoor, Inc., the Board finds that the Area Director's decision is not supported by the record. Hancock submitted information, albeit to the Area Director rather than the Tribe. There is no evidence that either appellant or Hancock was informed that the information submitted was inadequate to respond to the inquiry. It is true that the Area Director's November 15, 1991, letter to Hancock indicated that the management agreement required approval under the lease. However, his cancellation decision was not based on failure to obtain approval of the management agreement but, rather, failure to submit information.

Although the Board finds the second reason for cancellation unsupported, it finds the first reason--failure to post a performance bond--entirely sufficient to support the Area Director's decision.

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the Area Director's February 6, 1992, decision is affirmed as modified by deletion of the second reason for cancellation.

//original signed
Anita Vogt
Administrative Judge

I concur:

//original signed
Kathryn A. Lynn
Chief Administrative Judge